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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. MAURICE HIGGS, Defendant and Appellant.	C085090 (Super. Ct. No. 16FE017541)

Defendant Maurice Higgs appeals his convictions for multiple sex offenses committed against his stepdaughter. He raises instructional and sentencing error; we direct correction of the abstract of judgment and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In 2012 and 2013, defendant was in his early 30's and X.M. (victim) was five to six years old. The victim's mother, S.H. (mother), was married to defendant. Defendant was like a father to the victim; they did fun things together but sometimes he punished her, including giving "whooping[s]" with a cord, belt, or shoe. Defendant often took the

children to a neighborhood park, where he sexually abused the victim on at least 10 occasions by making her orally copulate him in the car, while the other children played outside. Defendant said if she told anyone about it he would give her a "whooping," and she was afraid. This happened when the victim was aged five through seven years.

In May 2016 the victim told her grandmother about the abuse. The grandmother told the mother; the mother in turn confronted defendant, who denied the accusations. The mother then contacted law enforcement.

Law enforcement interviewed the victim, who confirmed defendant repeatedly forced her to orally copulate him in the car at the park when she was younger. Law enforcement met with defendant in July 2016, and he denied the abuse. In September 2016 defendant called the mother and admitted the abuse as the victim had described it. The mother advised law enforcement, who met with defendant again. He then admitted he had done "everything that my stepdaughter said I did." However, defendant claimed the victim had orally copulated him only twice and denied he had ever threatened her. In December 2016 he wrote a letter to the victim wherein he apologized for the "unexplainable" things he had done to her.

Defendant was charged by information with three counts of committing a lewd and lascivious act by force or fear (i.e., placing his penis to the mouth of the victim) upon a child under the age of 14, (Pen. Code, § 288, subd. (b)(1)--counts one, three, and five),[1] and three counts of oral copulation with a child 10 years of age or younger (§ 288.7, subd. (b)--counts two, four, and six). The information also alleged that defendant had two prior strike convictions.

The jury found defendant guilty as charged in counts two through six, and in count one, guilty of the lesser included offense of committing a lewd and lascivious act (with

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[1] Undesignated statutory references are to the Penal Code.

no charged force or fear) upon a child under the age of 14. (§ 288, subd. (a).) In a court trial, the court found the strike allegations true.

The trial court sentenced defendant to a term of 150 years to life in prison--a three strikes sentence--as follows: consecutive 45-year-to-life sentences on each of counts two, four, and six (15 years to life multiplied by three per section 667, subd. (e)(2)(A)(i)), plus five years on each count (§ 667, subd. (a)), and imposed stayed terms (§ 654) of 25 years to life on counts one, three, and five. As relevant here, the court ordered a $5,000 restitution fine (§ 1202.4), and an identical parole revocation fine imposed and stayed (§ 1202.45), as well as various fees and assessments.

DISCUSSION

I

Instruction Modification

Defendant contends the trial court prejudicially erred in modifying the pattern jury instruction regarding committing a forcible sexual act (§ 288, subd. (b)(1)) by adding language to the definition of duress. He contends the instruction was argumentative and directed a verdict against him. Although we do not condone unnecessary deviation from the applicable pattern instructions, as the trial court did in this case, we see no prejudicial error here.

The pattern instruction at issue here reads in pertinent part: "Duress means the use of a direct or implied threat of force, violence, danger, hardship, or retribution sufficient to cause a reasonable person to do [or submit to] something that he or she would not otherwise do [or submit to]." (CALCRIM No. 1111.) To the next sentence of the pattern language, the trial court added the two words we italicize below: "When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the child, *her size* and her relationship to the defendant." (*Ibid*.)

First, defendant did not object to the addition of this language to the instruction. In fact, defense counsel expressly indicated his approval of the final version of

instructions, including the specific changes to CALCRIM No. 1111. Accordingly, we agree with the Attorney General that defendant's claims of error are forfeited. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1223-1224.) Nevertheless, we reach the merits as defendant claims the alleged instructional error affected his substantial rights.

When the latest edition of approved jury instructions contains an instruction applicable to a case, it is strongly encouraged that the trial courts use and not deviate from those standard CALCRIM instructions. (Cal. Rules of Court, rule 2.1050(e); *People v. Thomas* (2007) 150 Cal.App.4th 461, 465.) Here, the standard instruction informed the jury it was to consider "all the circumstances" of the case in determining duress. The relative size of defendant and the victim are included in "all the circumstances" of the case. Thus, the added factor was subsumed within the standard instruction, was unnecessary, and arguably emphasized one of the circumstances (size difference) over any others argued by the parties. When, as here, the pattern instruction is adequate to permit proper argument using the specific facts of the case, the better practice is for the trial court to refrain from modification.

With that said, any error was clearly harmless. It is well established that the relative sizes of the victim and defendant are proper factors for the jury to consider in determining duress. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 51 ["The total circumstances, including the age of the victim, and his relationship to defendant are factors to be considered in appraising the existence of duress. . . . The disparity in physical size between an eight-year-old and an adult also contributes to a youngster's sense of his relative physical vulnerability"]; see also *People v. Cochran* (2002) 103 Cal.App.4th 8, 13-14; *People v. Veale* (2008) 160 Cal.App.4th 40, 47-48; *People v. Schulz* (1992) 2 Cal.App.4th 999, 1005.) The inclusion of the additional language, although unnecessary, was not inaccurate. Here the disparity was also obvious, without aid of the instruction, given the age and gender difference, and the evidence of duress was strong. (*People v. Aranda* (2012) 55 Cal.4th 342, 375 [state law instructional error is

subject to harmless error review under *Watson* standard].) That is, it is not reasonably probable that in the absence of an error defendant would have obtained a more favorable result. (*People v. Watson* (1956) 46 Cal.2d 818, 837.)

Defendant was in his 30's and the victim was in kindergarten when the abuse started. He acted as a father figure, including imposing physical discipline. He repeatedly isolated her away from the house and made her orally copulate him, threatening to "whoop" her (as he had done in the past) if she told anyone. As "a factual matter, when the victim is . . . young . . . and is molested by her father in the family home, in all but the rarest cases duress will be present." (*People v. Cochran, supra,* 103 Cal.App.4th at p. 16, fn. 6, overruled on other grounds as stated in *People v. Soto* (2011) 51 Cal.4th 229, 248, fn. 12.)

Further, defendant admitted he had done everything the victim accused him of, although he later minimized the abuse and coercion, and sent her a letter of apology. Finally, by acquitting on one of the charged counts including duress and finding defendant guilty on the lesser crime, which did not require a finding of duress, the jury necessarily found no duress as to some of defendant's conduct. Thus, the jury was not overly influenced by the consideration of size difference in reaching its verdicts.

On this record, we find no reasonable probability that the jury would have reached a different conclusion had the trial court not modified the instruction. Any error was therefore harmless.

II

Sentencing Claims

A. *Cruel and Unusual Punishment*

Defendant contends the 150-year sentence imposed by the trial court amounts to cruel punishment in violation of both the federal and California Constitutions. He argues the indeterminate term is impossible to serve in his lifetime, thus it is effectively a sentence of life without possibility of parole (LWOP).

Defendant did not object to the constitutionality of his sentence in the trial court. Because the determination of whether a sentence violates the constitutional proscription against cruel unusual punishment is "fact specific, the issue must be raised in the trial court." (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.) It was not raised; consequently, any claim that defendant's sentence is unconstitutional as applied is forfeited.

Defendant posits that we should hear his claim because it is based on the purely legal question of whether the length of his sentence converts it to an LWOP sentence and thus renders it unconstitutional. Here, as the Attorney General points out, defendant's three strike sentence was mandatory. Defendant "has a considerable burden to overcome when he challenges a penalty as cruel or unusual. The doctrine of separation of powers is firmly entrenched in the law of California and the court should not lightly encroach on matters which are uniquely in the domain of the Legislature." (*People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 529.)

A punishment may be cruel or unusual if "it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424.) Punishment is cruel and unusual under the Eighth Amendment if it involves the "unnecessary and wanton infliction of pain" or if it is "grossly out of proportion to the severity of the crime." (*Gregg v. Georgia* (1976) 428 U.S. 153, 173; *Ewing v. California* (2003) 538 U.S. 11, 20, 23; *Lockyer v. Andrade* (2003) 538 U.S. 63, 72.)

Under the federal and California Constitutions, courts follow substantially the same three guidelines in measuring the relationship between the crime and the punishment: (1) the nature of the offense and the offender, including his age, prior criminality, personal characteristics, and state of mind; (2) the comparison of the penalty with punishments in the same jurisdiction for different offenses that are more serious; and (3) the comparison of the penalty with the punishments for the same offense in other

jurisdictions. (*In re Lynch, supra*, 8 Cal.3d 410 at pp. 425-427; *People v. Dillon* (1983) 34 Cal.3d 441, 479; *Solem v. Helm* (1983) 463 U.S. 277, 290-291.)

Defendant makes a minimal effort to analyze the *Lynch* factors; he does not compare his sentence with punishment for the same offense in other states or with more serious offenses in California. We agree that the comparison would not be favorable to his position. Further, regarding the first guideline, our purely legal review does not permit us to consider the nature of the offense and the offender; these were considerations for the trial court in the first instance.

Defendant cites a concurring opinion to support his purely legal argument that *any* sentence longer than the human lifespan is inherently cruel and unusual. (*People v. Deloza* (1998) 18 Cal.4th 585, 600-601 (conc. opn. of Mosk, J.).) But defendant's argument is premised on a concurring opinion that has "no controlling weight" or precedential value (*People v. Byrd* (2001) 89 Cal.App.4th 1373, 1383). Further, the purely legal issue of whether any sentence longer than the human lifespan, dispensed to an adult offender, is inherently cruel and unusual has been answered by the United States Supreme Court. "[I]mposition of a sentence of life without possibility of parole in an appropriate case does not constitute cruel or unusual punishment under either our state Constitution [citation] or the federal Constitution." (*Byrd*, at p. 1383, citing *Harmelin v. Michigan* (1991) 501 U.S. 957 [sentence of LWOP for possession of 672 grams of cocaine not cruel and unusual punishment].)

Accordingly, defendant's sentence does constitute cruel and/or unusual punishment.

B. *Abstract of Judgment*

We note that the abstract of judgment indicates restitution and parole revocation fines of $300 rather than the $5,000 amounts orally imposed at sentencing. This error should be corrected. (See *People v. Zackery* (2007) 147 Cal.App.4th 380, 385 [oral

pronouncement controls]; *People v. Rowland* (1988) 206 Cal.App.3d 119, 123 [clerical error where minutes fail to reflect oral pronouncement may be corrected at any time].)

The parties agree that the abstract of judgment indicates the crimes of conviction were committed in 2016 (the year the crimes were first reported) and suggest the year of commission should be listed as 2013.

Because the crimes of conviction were alleged to have occurred between 2012 and 2014, we see no reason not to list that period (2012-2014) on the abstract of judgment. However, we leave it to the trial court's discretion to make whatever correction(s) it feels necessary to the years listed and any other clerical and typographical errors that upon its review are evident in the abstract.

DISPOSITION

The judgment is affirmed. The trial court is directed to prepare a corrected abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation.

/s/
Duarte, Acting P. J.

We concur:

/s/
Hoch, J.

/s/
Renner, J.